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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-595

JERRY HOWARD SIMPKINS and
JESSE HOWARD SIMPKINS,
Petitioners

v

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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BRIEF AND APPENDIX OF PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1974

RECORD NO.

JERRY HOWARD SIMPKINS and
JESSE HOWARD SIMPKINS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on October 18, 1974.

CITATION TO OPINION BELOW

A jury, sitting in the Eastern District of Virginia, Norfolk Division, returned verdicts of guilty against the Petitioners herein on May 30, 1973. On November 6, 1973, the Honorable Richard B. Kellam, Judge of the Eastern District of Virginia, denied without opinion defense motions to set aside the verdict and either dismiss the indictments or grant the petitioners herein new trials. Judgments thereon were entered November 7 and 8, 1973. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is not yet reported. The opinion of the Fourth Circuit, dated October 18, 1974, is printed in Appendix A hereto, infra, p.1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The questions presented for decision are:

1. Did the denial of a speedy trial entitle the petitioners to have the indictments against them dismissed?

2. Did the prejudicial comments of the trial judge deprive the petitioners of their right to a fair trial?

3. Was cross-examination of the prosecution's chief witness unfairly limited by the trial judge?

STATUTORY PROVISIONS INVOLVED

Petitioners rely upon the speedy trial guarantee of the Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .

The indictments returned against the petitioners alleged violations of 18 U.S.C. §§ 2312 and 2314. Said sections read:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. 18 U.S.C. § 2312.

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities, or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud. . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
> 18 U.S.C. § 2314.

STATEMENT OF THE CASE

The United States of America, respondent herein, instituted these proceedings against the petitioners upon Indictment No. 213-71-N, returned November 8, 1971, charging violations of 18 U.S.C. §§ 2312 and 2314. The indictment named three defendants, the petitioners and Jack Allen Booher. Four violations of 18 U.S.C. § 2312 and four violations of 18 U.S.C. § 2314 were alleged in the indictment. Allegedly involved was the unlawful transportation in interstate commerce of certain automobiles and heavy machinery with knowledge that each item was stolen.

Trial of Indictment No. 213-71-N was scheduled for March 9, 1972. A continuance was granted defense counsel because of illness. A new trial date, March 13, 1972, was assigned. Prior to

March thirteenth, the prosecuting attorney called defense counsel and requested his agreement to a continuance for the purpose of obtaining immunity for the prosecution's chief witness, Ellen O'Meara. Defense counsel consented to the continuance with the provision that the case be reset and tried within forty-five days. Shortly after this agreed continuance, Mr. John A. Field, III, the Assistant United States Attorney involved, was appointed United States Attorney for the Southern District of West Virginia, and the case was turned over to Assistant United States Attorney, Mr. Roger T. Williams.

Indictment 213-71-N was dismissed against the co-defendant, Jack Allen Booher, in the spring of 1972. Upon learning of this, defense counsel wrote to Mr. Williams on June 15, 1972, and August 28, 1972, requesting that the indictment against the petitioners be dismissed on the grounds that justice should be uniformly applied. Furthermore, between August 28, 1972 and February, 1973, defense counsel spoke to Mr. Williams, demanding the cases be set for trial or dismissed, to which request Mr. Williams stated that he was awaiting direction from his superiors.

Immunity was obtained for Ellen O'Meara and she appeared before a grand jury on March 13, 1973. The grand jury returned a new indictment against the petitioners. This indictment, Cr. No. 69-73-N, was identical in number of

counts (eight) and substance as the indictment of November 8, 1971, No. 213-71-N, with the exception that Jack Allen Booher was not included as a defendant.

Defense counsel then moved to dismiss with prejudice Indictments No. 213-71-N and 69-73-N on the grounds that petitioners had been denied their right to a speedy trial. At a hearing on April 2, 1973, the Honorable Walter E. Hoffman, District Judge, dismissed Indictment No. 213-71-N and set a hearing on the defense motions for April 17, 1973. At the later hearing, Mr. Hunter Sims, the Assistant United States Attorney now handling the case, delivered a "Superseding Indictment", Cr. No. 91-73-N, to defense counsel. This indictment substituted for Count I of 69-73-N and merely changed the allegedly violated section from 18 U.S.C. § 2314 to 18 U.S.C. § 2312. On April 17, 1973, the Court made the substitution and overruled the defense motions to dismiss the indictments for want of a speedy trial.

The petitioners were tried and found guilty by a jury on May 30, 1973.

On April 17, 1973, evidence was adduced from the petitioners in support of their motion to dismiss the indictments against them due to the deprivation of their speedy trial right. The testimony showed that Mr. Howard Strickland would have been called as a witness at the trial,

rescheduled for March 13, 1972; that his testimony would have been that all his business dealings with the petitioners were legitimate; but that he died in April 1972, during the government's continuance. Also, the testimony at the April 17, 1973 hearing showed that Lottie Gertrude Simpkins, mother of Jesse Howard Simpkins, would have been called as a witness at the March 13, 1972 trial; that she had had a telephone conversation with Ellen O'Meara in August 1970 while she was serving as office manager of the petitioners' business; that said conversation tended to exonerate the petitioners of any knowledge that the items in question were stolen; and that she died on January 1, 1973.

Without the witness Ellen O'Meara, the petitioners would not have been convicted. This witness claimed to be one of thirty people in an organized crime ring operating out of New York which stole the items in question. She stated she was a convicted felon, admitted she was granted government immunity from prosecution and admitted she was involved in all types of underworld and illegitimate activities for many years.

O'Meara was asked by defense counsel to state the names of the members of the crime ring to test her veracity. The witness refused to answer. The Court, upon request of the government, upheld her refusal to answer. This witness

made the statement that the petitioners knew with whom they were dealing.

In preliminary remarks to the jury, the Court commented that any action of counsel in raising objections should not be interpreted as impropriety on their part and that such counsel have a tremendous duty in a criminal case. During the third day of trial, in the presence of the jury, the trial judge, in a loud, strident voice, yelled at the defense counsel that he was not conducting himself properly. An immediate motion for mistrial was denied. Defense counsel then requested the Court to instruct the jury that no inference of misconduct on the part of defense counsel should be drawn from the remarks of the Court. The Court refused.

REASONS FOR GRANTING THE WRIT

A. The Petitioners were denied their fundamental right to a speedy trial. The underlying basis and the fairness inherent in this right is illustrated by the facts of this case.

An eighteen month delay by the prosecution saw the death of two witnesses material to the defense. The delay was against the wishes of defense counsel, who repeatedly pressed for a trial.

The constitutional test of the denial of this right is the interrelationship of

four factors: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

An eighteen month delay has been held presumptively prejudicial. Delph v. Slayton, 355 F.Supp. 888 (W.D.Va. 1973)—seventeen month delay; United States v. De Tienne, 468 F.2d 151 (7th Cir. 1972)—nineteen month delay. There was no consideration of this factor by either the trial or appellate courts in this case.

The government has offered no justification for the delay, which elicited the comment from the district judge who heard the motion to dismiss on April 17, 1973, that this case was ". . .not the finest example of efficiency in getting a case around to trial. . ." A twelve month delay in bringing the witness Ellen O'Meara before a grand jury is inexcusable and should be weighed against the loss of two material witnesses for the petitioners.

Petitioners challenge the bare assertion of the appellate court below that ". . .the defendants had not asserted their right to a speedy trial until the April 2, 1973 hearing." Defense counsel had made demands to the United States Attorney, on at least six occasions, that the cases be set for trial or else dismiss the indictments. When the United States Attorney failed to take action, defense

counsel scheduled a hearing before the district court at the earliest opportunity. The reasoning of the appellate court would place on the accused the burden of seeking a speedy trial. This is the burden of the prosecution. "(S)ociety has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." Barker v. Wingo, 407 U.S. at 527.

The petitioners were prejudiced. "If witnesses die or disappear during a delay, the prejudice is obvious." Barker v. Wingo, 407 U.S. at 532. These petitioners lost two material witnesses during the government's delay.

The appellate court chose to ignore uncontradicted evidence that petitioners had asserted their right to a speedy trial. The actions of the petitioners were logical and reasonable when they made demands on the United States Attorney to set the case for trial or to dismiss the action. Certainly, the prosecution was not surprised when the petitioners sought the protection of the court in the face of their repeated demands to the United States Attorney. It is important to the uniform application of justice that this Court hold the prosecution accountable for its failure to bring this case to a speedy trial.

B. The petitioners were denied a fair trial by the prejudicial comments of the trial judge.

The trial judge should direct and control the proceedings and in the federal court has a right to comment on the evidence, but ". . .he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror. . ." Sunderland v. United States, 19 F.2d 202, 216 (8th Cir. 1927). In this case he became both. In the presence of the jury throughout the trial, defense counsel was chastized by the trial judge, who also made comments to the jury reflecting on the conduct of defense counsel, and, at one point, intimated that defense counsel was acting improperly. This bias of the trial judge was reinforced by his assuming the role of prosecutor by interposing objections to questions by trial counsel.

The trial judge is cloaked with more than judicial authority. The jury hangs on every word and gesture and constantly seeks some indication of the judge's judgment of the issue. United States v. Ah Kee Eng, 241 F.2d 157, 161, 62 A.L.R. 2d 159 (2d Cir. 1957). Measure this power against an outburst by the judge shouting in anger at defense counsel and refusing to soften the effect, upon request, and one is not surprised by the verdict of guilty. This is true even though the evidence against petitioners is not overwhelming, with the case

resting primarily on the testimony of one prosecution witness whose credibility is suspect.

This excessive abuse of the administration of justice should not be tolerated by this Court.

C. Cross-examination of the prosecution's chief witness was improperly limited by the trial judge.

The key witness for the United States was Ellen O'Meara. She testified that the petitioners knew the thirty members of the "ring" who were stealing the vehicles, knew the kind of people they were dealing with, and knew that if they did not pay they were in trouble.

This was a final answer to the only question in the case: Did the petitioners have knowledge that the vehicles were stolen. The only possible attack on this testimony was to obtain the names of the members of the ring and tender proof that the petitioners did not know the members and the members did not know the petitioners.

The appellate court suggests that since the petitioners did not subpoena the other three members of the so-called ring that there was no merit to this issue. Petitioners admitted that they knew O'Meara and the three other people handling the vehicles. Thus, there was no reason to call such witnesses. The

other twenty-six members, however, were critical to the defense. The number involved alone would suggest that this was an established criminal ring known to everyone, including the petitioners. The trial court left this proof in the minds of the jury and denied petitioners the right to test it.

If tested, this line of questioning might also have revealed answers which would discredit the witness and test her veracity.

CONCLUSION

Petitioners contend that the District Court, whose decision was affirmed by the Court of Appeals, has decided this case contrary to applicable decisions of this Court; and has decided an important question of federal law which has not been, but should be, settled by this Court; and has so far departed from the accepted and usual course of judicial procedure, as to call for an exercise of this Court's power of supervision. For these reasons, and for the further reason that this Court should always correct error where indicated, it is respectfully requested that certiorari be granted so that said error may be corrected.

Respectfully submitted,
JERRY HOWARD SIMPKINS
JESSE HOWARD SIMPKINS

By:
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for Writ of Certiorari were mailed to the Solicitor General of the United States, The Honorable Robert H. Bork, Department of Justice, Washington, D. C. 20530, pursuant to the provisions of Rule 33 of the Revised Rules of the Supreme Court of the United States, before the date of the filing hereof.

_____

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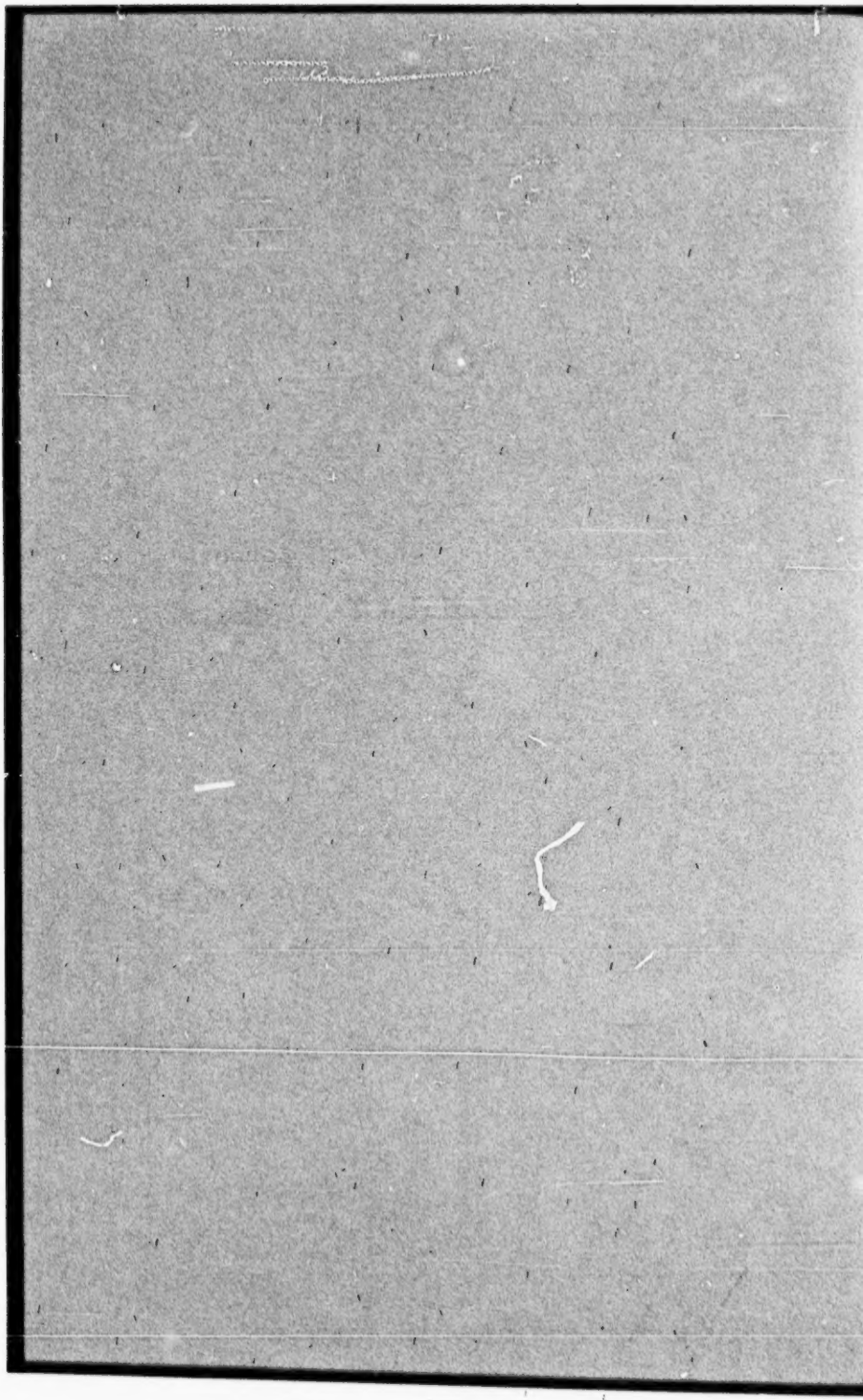

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 73-2509

United States of America,
Appellee,

v.

Jerry Howard Simpkins
Jesse Howard Simpkins,

Appellants

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Decided October 18, 1974
Filed October 18, 1974

Before ADAMS* and WIDENER, Circuit Judges

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* U.S. Court of Appeals for the Third Circuit; sitting by designation.

WIDENER, Circuit Judge:

The defendants were tried and convicted on eight counts of transporting stolen motor vehicles and other stolen goods in interstate commerce, knowing same to be stolen, in violation of 18 U.S.C. § 2312 and § 2314. The principal issues raised in this appeal concern their allegations that they were denied a speedy trial, that the district court erred in not requiring the key prosecution witness to divulge names of others involved in the stolen property operation, and that certain remarks made by the court to defense counsel unfairly prejudiced the trial.

The record shows that the original indictment against the defendants was returned on November 8, 1971, and trial was originally set for March 9, 1972. A four day continuance was granted on March 9, 1972, both because defendants' counsel was ill and because the key government witness, Ellen O'Meara, had for the first time requested a grant of immunity. The case was continued generally on March 13, 1972 because the government had not had sufficient time to obtain immunity for Miss O'Meara. The immunity request was finally granted on July 7, 1972, but the government was then unable to locate Miss O'Meara until September, 1972, when she was found to be incarcerated in a New York state prison. The United States was unable to obtain her release, on a writ of habeas corpus ad testificandum, from

New York state officials until the March, 1973 term of grand jury, when the defendants were reindicted. The trial commenced on May 24, 1973 on the reindictment, the original indictment having been dismissed without prejudice on April 2, 1973.

During this time, the defendants' attorney had written two letters to the Assistant United States Attorney in charge of the case, and had conversed with him several times, requesting that the indictments be dismissed. No request for a speedy trial was made to the court until the April 2, 1973 hearing on the motion to dismiss.

In Barker v. Wingo, 407 US 514 (1972), the Supreme Court set forth a balancing test where four factors are to be considered in determining whether the right to speedy trial was violated: (1) the length of the delay; (2) reasons for the delay; (3) the defendants' responsibility to assert their right; and (4) prejudice suffered due to the delay. The district court considered these factors, noting primarily that the defendants had not asserted their right to a speedy trial until the April 2, 1973 hearing, and that no prejudice was shown in any event as they had not been incarcerated or otherwise suffered any material damage to their defense. Our examination of the record supports the district court's finding as to this issue, and we find no error.

The witness O'Meara testified that she acted as a middleman between the members of an organized crime group, which operated primarily in New York City and which stole the items involved, and the defendants, who bought the items and transported them to their place of business in Norfolk, Virginia. She testified in detail concerning the items charged in the indictment, the fact that she typed false bills of sale and invoices for stolen equipment, and often collected money from the defendants for stolen machinery they had purchased. Miss O'Meara stated on cross-examination that she would not reveal the names of some of the main figures in the organized crime ring, at least some of whom had dealt with the defendants, because she feared for her life. The gist of her testimony in this regard was that the defendants did not know many of the members of the ring but did know a few who were involved in delivering the automobiles and machinery in question. Miss O'Meara did reveal the names of three such ring members who had already been arrested, apparently in connection with these or related crimes, and testified concerning these ring members' relationship with the defendants. The district court overruled defendants' contentions that she should reveal the names of other crime ring members that she knew, stating that the question was interstate transportation of stolen goods, and that it did not matter who stole the goods. Defendants contended that the names were

highly relevant because they could use these unknown persons to prove they had no knowledge the goods were stolen and did not know with whom they were dealing.

We find no merit to the defendants' contention. Of course, the rule is well settled that the scope of cross-examination is generally within the discretion of the trial court and usually limited to matters brought out on direct. See United States v. Williams, 478 F2d 369, 371 (4th Cir. 1973); United States v. Chase, 372 F2d 453, 463 (4th Cir. 1967). But, in any event, we note that the defendants did not attempt to use as witnesses those crime ring members who were named by Miss O'Meara. They have given us no reason to believe that they would have used the unnamed criminal members. We are of opinion the district court acted within its discretion in not requiring the witness to divulge names of persons not directly involved with the crime charged, and whose testimony, if available, could be of little or no value to the defense. In addition, any error committed was harmless. We have had brought to our attention no potential witness with whom the defendants dealt who could not have been subpoenaed.

The defendants also claim error in the court's denial of their motion for a mistrial based on alleged prejudice resulting from comments of the court to the defense attorney. On several

occasions during the four day trial, the court had admonished the attorney as to the improper form of questioning and his comments on the evidence, or made other similar objections to his trial tactics. The most critical exchange between the court and the attorney occurred when the court interrupted a question the attorney directed toward a witness during cross-examination, advised him that he was testifying, and that the form of the question was improper. Quite vigorous in his protest, the attorney remarked that the prosecution had not objected to his form of questioning, and that, in essence, he was not able to properly cross-examine the witness. The court then admonished him as follows:

> ". . .if you will conduct yourself as a lawyer should conduct himself in a court-room, you will receive every consideration. If you do not wish to proceed in that manner, then you will not receive every consideration; and there's no reason for you to raise your voice to the jury or this court."

During its instructions to the jury on the following day, the court advised the jury that its comments directed toward counsel should not be taken as any indication that it felt the defendants were or were not guilty, nor should the jury attempt to reward or punish the defendants because

of any such incidents.

We find no prejudice to defendants. The trial court has a duty to see that the facts are developed and the jury not left confused. The court here acted within its discretion in warning counsel to desist from what it considered to be unnecessary actions. None of the court's comments were directed to the defendants' credibility or the strength of their case. The case against them was not a weak one, and the court's instructions to the jury were sufficient to correct any prejudice which might have resulted because of its comments to counsel. We think this case falls within the holdings of this court in United States v. Dockery, 417 F2d 330 (4th Cir. 1969) and Butler v. United States, 191 F2d 433 (4th Cir. 1951).

We have considered the other assignments of error and find them without merit.

The judgment of the district court is accordingly

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-595

JERRY HOWARD SIMPKINS AND JESSE HOWARD SIMPKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were improperly limited in cross-examining a government witness, that they were denied their right to a speedy trial, and that they were prejudiced by the trial court's admonitions to defense counsel.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on eight counts of interstate transportation of stolen vehicles and other stolen property, in violation of 18 U.S.C. 2312 and 2314. Jerry Howard Simpkins was sentenced to a term of three years imprisonment, all but six months of which was suspended, with three years' probation. Jesse Howard Simpkins was given a term of three years' probation, and fined $5,000. The court of appeals affirmed in a thorough opinion (Pet. App.).

The government's case was based principally upon the testimony of Ellen O'Meara, who was the intermediary between petitioners and members of a New York organized crime ring. Ms. O'Meara explained in detail her dealings with the Simpkinses in procuring stolen automobiles and machinery for them, preparing bogus bills of sale and invoices at their direction, and collecting money they owed to the New York connections (Tr. 399-445).

1. Petitioner's contention that the trial court improperly limited their cross-examination of Ms. O'Meara is insubstantial.

On cross-examination, defense counsel inquired into the names of the members of the theft ring. O'Meara refused to answer, explaining that her life would be endangered if she answered those inquiries (Tr. 446-447). The trial court sustained a subsequent objection to the question because it was irrelevant to the issue at hand, *i.e.*, whether or not the vehicles and machines were transported in interstate commerce by petitioners and whether, at the time they were transported, petitioners knew they were stolen (Tr. 521-523).

The government never contended, and the evidence did not show, that petitioners dealt with any of the main figures in the organized crime ring other than O'Meara. Trial testimony did reveal that petitioners did not know many of the members of the ring (Tr. 483), but that they had had some contact with Gary Melius, Artie Dome, and an individual named Pauley (Tr. 416, 436, 450). These people were involved in delivering the automobiles and machinery. Petitioners contend that the names of others were relevant because they could use these unknown persons to prove they had no knowledge the goods were stolen and did not know with whom they were dealing. However, in endorsing the trial court's action, the court of appeals properly ruled (Pet. App. A5):

> * * * [T]he scope of cross-examination is generally within the discretion of the trial court and usually limited to matters brought out on direct. See *United States* v. *Williams*, 478 F.2d 369, 371 (4th Cir. 1973); *United States* v. *Chase*, 372 F.2d 453, 463 (4th Cir. 1967). But, in any event, we note that the defendants did not attempt to use as witnesses those crime ring members who *were* named by Miss O'Meara. They have given us no reason to believe that they would have used the unnamed criminal members. We are of the opinion the district court acted within its discretion in not requiring the witness to divulge names of persons not directly involved with the crime charged, and whose testimony, if available, could be of little or no value to the defense. In addition, any error committed was harmless. We have had brought to our attention no potential witness with whom the defendants dealt who could not have been subpoenaed. [Emphasis added.]

2. There is no merit to petitioners' contention that the trial court's admonitions to their attorney denied them a fair trial.

On several occasions during the hotly contested, four-day trial, Judge Kellam admonished defense counsel to state his questions in proper form, to refrain from commenting on the evidence, and generally to upgrade his trial tactics (Tr. 473, 508-510, 523-524).

The most critical exchange between the court and the attorney occurred when the court interrupted a question the attorney was directing toward a witness during cross-examination, and advised the attorney that he was testifying and that the form of the question was improper. Shouting in protest, the attorney declared that the pros-

ecution had not objected to his form of questioning and that, in essence, he was not able properly to cross-examine the witness (Tr. 816-817). The court then admonished him as follows (Tr. 817-818):

> * * * [I]f you will conduct yourself as a lawyer should conduct himself in a courtroom, you will receive every consideration. If you do not wish to proceed in that manner, then you will not receive every consideration; and there's no reason for you to raise your voice to the jury or this Court.

During its instructions to the jury on the following day, the court advised the jury that its comments directed toward counsel should not be taken as any indication that it felt the defendants were or were not guilty, nor should the jury attempt to reward or punish the defendants because of any such incidents (Tr. 916-917).[1]

The court of appeals, upon whose opinion we rely, properly ruled that there had been no prejudice to the defendants (Pet. App. A7):

> The trial court has a duty to see that the facts are developed and the jury not left confused. The court here acted within its discretion in warning counsel to desist from what it considered to be unnecessary actions. None of the court's comments were directed to the defendants' credibility or the strength of their case. The case against them was not a weak one, and the court's instructions to the jury were sufficient to correct any prejudice which might have resulted because of its comments to counsel.

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[1]At the beginning of the trial, as well, Judge Kellam advised the jury that they should not be affected by vigorous courtroom interchanges (Tr. 22-23).

See *United States* v. *Weiss*, 491 F.2d 460 (C.A. 2), certiorari denied, No. 73-1736, October 15, 1974; *United States* v. *Boatner*, 478 F.2d 737 (C.A. 2), certiorari denied, 414 U.S. 848.

3. The claim that petitioners were denied their right to a speedy trial is also without foundation.

Petitioners were originally indicted on November 8, 1971 (Transcript of April 2, 1973, hearing on motion to dismiss, p. 4). A four day continuance was granted on March 9, 1972, because the key government witness, Ellen O'Meara, had for the first time requested a grant of immunity. The case was continued with the agreement of defense counsel on March 13, 1972, because the government had not had sufficient time to obtain immunity for Ms. O'Meara and because defense counsel was ill (Transcript of April 17, 1973, hearing on motion to dismiss, pp. 41-42). The immunity request was finally approved on July 10, 1972. The government was then unable to locate Ms. O'Meara until September 1972, when she was found to be incarcerated in a New York state prison; it was, however, impossible to obtain her release on a writ of *habeas corpus ad testificandum* from New York State officials until the March 1973 term of grand jury, when petitioners were reindicted[2] (Transcript of April 2, 1973, hearing on motion to dismiss, pp. 6-7).

The trial on the superseding indictment commenced on May 24, 1973, the original indictment having been dismissed without prejudice on April 2, 1973.

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[2]The government's efforts to locate Ms. O'Meara began in June 1972, before immunity was secured for her. From October 1972, the government sought to obtain her from New York State penal authorities, who initially requested that she be extradited.

During this time, petitioners' attorney had written two letters to the Assistant United States Attorney in charge of the case and had conversed with him several times, requesting that the indictments be dismissed. No request for a speedy trial was made to the court until the April 2, 1973, hearing on the motion to dismiss (April 2 Tr., pp. 8, 10). During this period, petitioners were free on personal recognizance (*id.* at 5).

In *Barker* v. *Wingo,* 407 U.S. 514, this Court held that four factors are to be considered in determining whether the right to speedy trial has been violated: (1) the length of the delay; (2) reasons for the delay; (3) the defendants' responsiblity to assert their right; and (4) prejudice suffered due to the delay. Consideration of those factors in light of the facts of this case shows that petitioners were not denied their right to a speedy trial.

The delay was not unreasonably long in light of the reasons for it. The 18-month period between the original indictment and the trial was not wholly attributable to the government. From November 1971 to March 1972, a period of four months, and from March 1973 to May 1973, a period of two months, the cases were moving routinely from indictment through arraignment and to trial. The early 45-day continuance was agreed to by defense counsel and occasioned in part by his illness. The remaining period—slightly less than 11 months—of the delay was primarily due to the government's inability to locate and obtain the surrender of Ms. O'Meara. The circumstances here could not have been changed, nor the case expedited, regardless of the priority assigned to the matter or the urgency accorded it by the United States Attorney. See *Pitts* v. *North Carolina*, 395 F.2d 182 (C.A. 4).

Petitioners did not assert their right to a speedy trial until April 2, 1973. The earlier letters and phone calls to the prosecutor were essentially attempts to obtain a dismissal of the indictment.[3]

Finally, as both courts below found, "no prejudice was shown in any event as [petitioners] had not been incarcerated or otherwise suffered any material damage to their defense" (Pet. App. A3).[4]

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[3]The letters sent to the prosecutor (Appendix to petitioners' brief in the court of appeals, p. 21) indicate that petitioners wanted the government to follow the course of the first indictment against a then co-defendant, Jack Booher, by dismissing the indictment and foregoing prosecution. They only asserted their speedy trial rights when, at arraignment on the re-indictment, they knew that Booher had also been re-indicted and would be prosecuted. This may account for the fact that a request was not made to the court until the April 2, 1973, hearing.

[4]Petitioners contend that the delay "saw the death of two witnesses material to the defense" (Pet. 8). The witnesses were petitioner Jesse Simpkins' mother and one Howard Strickland.

Petitioners' version of what Strickland would have testified is set out in the transcript of the April 17, 1973, hearing on the motion to dismiss at 19-22. In denying that motion, the trial judge correctly concluded, "I doubt seriously that [Strickland's] testimony would have been of any consequence." *Id.* at 58.

As to the mother, Mrs. Hattie G. Simpkins, petitioners apparently never intended to call her for the trial scheduled on March 9, 1972, or at any other time. She was not subpoenaed for the original trial date, although another family member who was expected to testify was subpoenaed. *Id.* at 47.

Mrs. Simpkins, who was in her seventies, suffered a stroke in August 1970, and remained in the hospital constantly until her death on January 1, 1973. Had petitioners actually wanted Mrs. Simpkins as a witness, they could have taken a deposition to preserve her testimony pursuant to the provisions of 18 U.S.C. 3503. In fact, this possiblity was considered but not acted upon. *Id.* at 50-51.

In any event, as the trial court concluded, Mrs. Simpkins' testimony would have been of no practical value to the defense. *Id.* at 59. It was not significant enough to establish a "reasonable pos-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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sibility that the jury could have reached a different result by considering the asserted evidence foreclosed by delay." *Favors* v. *Eyman*, 466 F.2d 1325, 1328 (C.A. 9)); *Turner* v. *Slayton* (C.A. 4), No. 73-1027, February 7, 1974.